BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF EASTMONT DEVELOPMENT COMPANY, INC., Appellant, v. SNOHOMISH HEALTH DISTRICT, SNOHOMISH COUNTY, and the WASHINGTON STATE DEPARTMENT OF ECOLOGY, Respondents.	PCHB No. 86-23 ORDER AFFIRMING JURISDICTION

On its own motion, the Board raised a question of its jurisdiction over the instant appeal. All parties submitted briefs on the issue. On February 27, 1986, the Board heard oral argument at its offices in Lacey, Washington.

Appellant Eastmont Development was represented by Paul Sikora, Attorney at Law. Snohomish Health District was represented by Allen H. Sanders, Attorney at Law. The Department of Ecology was represented by Kathleen D. Mix, Assistant Attorney General. Snohomish

County submitted its memorandum through Sue A Tanner and Edward E Level, Deputy Prosecuting Attorneys.

For the purposes of the jurisdictional issue, the Board accepts the following as true.

1. Appellant Eastmont Development's application for a permit to operate a solid waste disposal site was denied by the Snohomish Health District on September 18, 1985, and a hearing was requested on this denial on September 20, 1985.

2. A hearing officer was selected to hear the matter for the Health District and on December 3, 1985, this officer conducted a quasi-judicial hearing in accordance with the District's regulations. His decision was rendered in writing on January 22, 1986. He affirmed the denial of the permit.

3. On January 30, 1986, appellant filed a Notice of Appeal of the hearing officer's determination to this Board.

4. On February 11, 1986, the Department of Ecology filed with this Board its request that the hearing be formal.

DISCUSSION

Before a solid waste disposal site may be established, a permit must be obtained from the jurisdictional health department. RCW 70.95.170. When the permit hearing procedures before the health department are complete, a further appeal within the administrative arena is provided for. RCW 70.95.210.

The problem is to determine whether the statutory review scheme calls for this administrative appeal to go to the Department of

Ecology or to this Board.

Often, as here, where the wishes of the Legislature are not manifestly clear, the exercise is not truly one of identifying legislative intent, but rather the more rarified effort of discovering what the Legislature would have intended had the matter been thought about.

After peering into the mists of statutory language, we believe we have glimpsed the will-o-the-wisp in question, and make bold to announce that the jurisdiction is ours. Here's why we think so.

RCW 70.95.210 remains as it was initially enacted in 1969. Under it, the denial of a permit by the health department can be followed by an initial hearing, after which the health officer is to notify the applicant of his "determination" (presumably either issuance or denial). Then,

> Any party aggrieved by such determination may appeal to the department of environmental quality. ... The department shall hold a hearing in accordance with the provisions of the Administrative Procedure Act, chapter 34.04 RCW, as now or hereafter amended.

The permitting function is an act of "licensing" as the APA uses that term. RCW 34.04.010(4)(5). Therefore, the health department's "determination" gives rise to a "contested case" under RCW 34.04.010(3).

The nature of the proceeding envisioned by RCW 70.95.210 is, thus, a trial-type hearing--a de novo advesary presentation of evidence and argument. See San Juan County v. Department of Natural Resources, 28

Wn.App. 796, 626 P.2d 995 (1981).

In 1970, the term "department of environmental quality" was legislatively made to refer to the Department of Ecology. RCW 43.21A.400. See also RCW 70.95.030(3).

However, with the creation of the Department of Ecology (DOE) in 1970, also came the creation of the Pollution Control Hearings Board (PCHB), an independent state agency intended to eliminate possible conflicts of interest that might occur with "in-house decisions" made by DOE. See ASARCO v. Air Quality Coalition, 92 Wn.2d 685, 601 P.2d 501 (1979).

The statute which created the PCHB is confusingly written. RCW 43.21B.140 suggests that RCW 43.21B.110 and RCW 43.21B.120 are the jurisdiction-granting sections. See Seattle v. Department of Ecology, 37 Wn.App. 819, 683 P.2d 244 (1984).

From RCW 43.21B.110 emerges the proposition that the PCHB has power to hear appeals from permit decisions of DOE.[1]

From RCW 43.21B.120 emerges the proposition that DOE is prohibited from holding hearings on permit decisions "within the jurisdiction of the department."

We decide that DOE is precluded from hearing an appeal of the Snohomish Health District's solid waste disposal site permit decision

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1/ We conclude that the term "issuance" implies permit denial as well as approval. The specifics listed in RCW 43.21B.110 support this.

because we believe that such a hearing involves a permit decision "within the jurisdiction of the department."

Common to all definitions of the term "jurisdiction" is the notion of the authority or power to decide a thing. See, e.g., Webster's 3d New International Dictionary (1971); Black's Law Dictionary (4th Ed., (1968); Ballentine's Law Dictionary (3d Ed., 1969); State ex rel. Troy v. Superior Court, 38 Wn.2d 352, 229 P.2d 518 (1951).

The power to hold a "contested-case" hearing is the power to decide the ultimate question of permit issuance or denial. That is the essence of the solid waste statute's grant of power to hold a hearing under the APA. It is, therefore, the quasi-judicial hearing function itself which brings the matter within DOE's jurisdiction.

To decide otherwise is to endorse a level of procedural redundancy which is antithetical to the aims of efficiency the Legislature proclaimed in establishing both the DOE and the PCHB. RCW 43.21B.020, RCW 43.21B.010. If DOE holds a hearing and reaches a decision, that decision would appear to be appealable to the PCHB as a permit decision "by the department in the exercise of its jurisdiction" under RCW 43.21B.110. The possibility thus exists for three de novo adversary hearings--one before the Health District's hearing officer, a second before DOE, a third before the PCHB. This would involve much more than a salutary "second look" before administrative action is final.[2] It would involve a second, third and fourth look at the

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2/ See Rains v. Department of Fisheries, 89 Wn.2d 740, 575 P.2d 1057 (1978).

original Health District decision. Nothing in any of the relevan statutory language suggests a legislative interest in such procedural overkill.

Accordingly, we conclude that RCW 43.21B.120 in 1970 took away from DOE the "jurisdiction" over solid waste disposal site permits granted a year earlier in RCW 70.95.210. But the difficulty is that what the Legislature took from DOE, it did not expressly grant to the PCHB. The Health District's determination is not a permit decision of DOE falling clearly within RCW 43.21B.110.

The statutory language, then, can be read to support the proposition that the matter has fallen through the cracks. This would mean that the applicant for a solid waste disposal site permit is entitled to a "contested case" hearing, but that no one has the authority to conduct it.

Such a Kafka-esque result is, we think, beyond the probable purpose of even the most subtle of legislative draftsmen. We decide that the jurisdiction of the PCHB over such hearings is necessarily implied from the total statutory context. No other plausible candidate for this function appears in the relevant legislation.

Moreover, the solid waste management statute suggests that more recently the Legislature has thought jurisdiction is in the PCHB. RCW 70.95.185 was added in 1984, providing that solid waste disposal site permits issued by the jurisdictional health department are to be reviewed by DOE and that no such permit "shall be considered valid until it has been reviewed by the department." If the DOE concludes

that the permit does not conform to the applicable standards it is expressly empowered to appeal the issuance of the permit to the PCHB.

RCW 70.95.185 supplements RCW 70.95.210 which provides that "any party aggrieved" may appeal the health officer's post-hearing determination. Under RCW 70.95.185, DOE is given a role as a "party" to a case before another body. This makes sense only if DOE's adjudicatory function has ceased to exist.[3]

Finally, the argument that amendment by implication is disfavored is not enough to alter our view. Disfavored or not, such amendment is, we think, what has occurred.

Unless amendment by implication was intended when chapter 43.21B RCW was enacted, all of the old appeal provisions in statutes administered by predecesor agencies to DOE remained unaffected.[4] In reason, this cannot have been the legislative purpose in creating the PCHB.

The process of cleaning up the statutes administered by predecesor agencies to DOE has been slow, faltering and piecemeal. But in no instance has the process involved a grant of "contested case" hearing power to DOE.

3/ To be sure, RCW 70.95.185 mandates DOE review only of local permit approvals, not permit denials. But logically, no special DOE review function is called for when the local answer is no. And if DOE is concerned about a reversal of such a negative decision, it can always seek to intervene in the "contested case" before the PCHB.

4/ See e.g., RCW 43.27A.200, RCW 70.94.333, RCW 86.16.110, RCW 90.03.080, RCW 90.48.135.

In sum, though its convoluted language remains a rich trove fc legal argument, we believe that chapter 43.21B RCW was intended simply to transfer all "contested case" jurisdiction from DOE to the PCHB. The cases all point in this direction. See ITT Rayonier v. Hill, 78 Wn.2d 700, 478 P.2d 729 (1970); Martin Marietta v. Woodward, 84 Wn.2d 329, 525 P.2d 247 (1974); ASARCO v. Air Quality Coalition, supra; Seattle v. Department of Ecology, supra.

ORDER

The Board affirms its jurisdiction over the subject matter of this case.

DONE this 13th day of March, 1986.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Lawyer Member

3/13/86

LAWRENCE J. FAULK, Chairman

Gayle Rothrock

GAYLE ROTHROCK, Vice Chairman